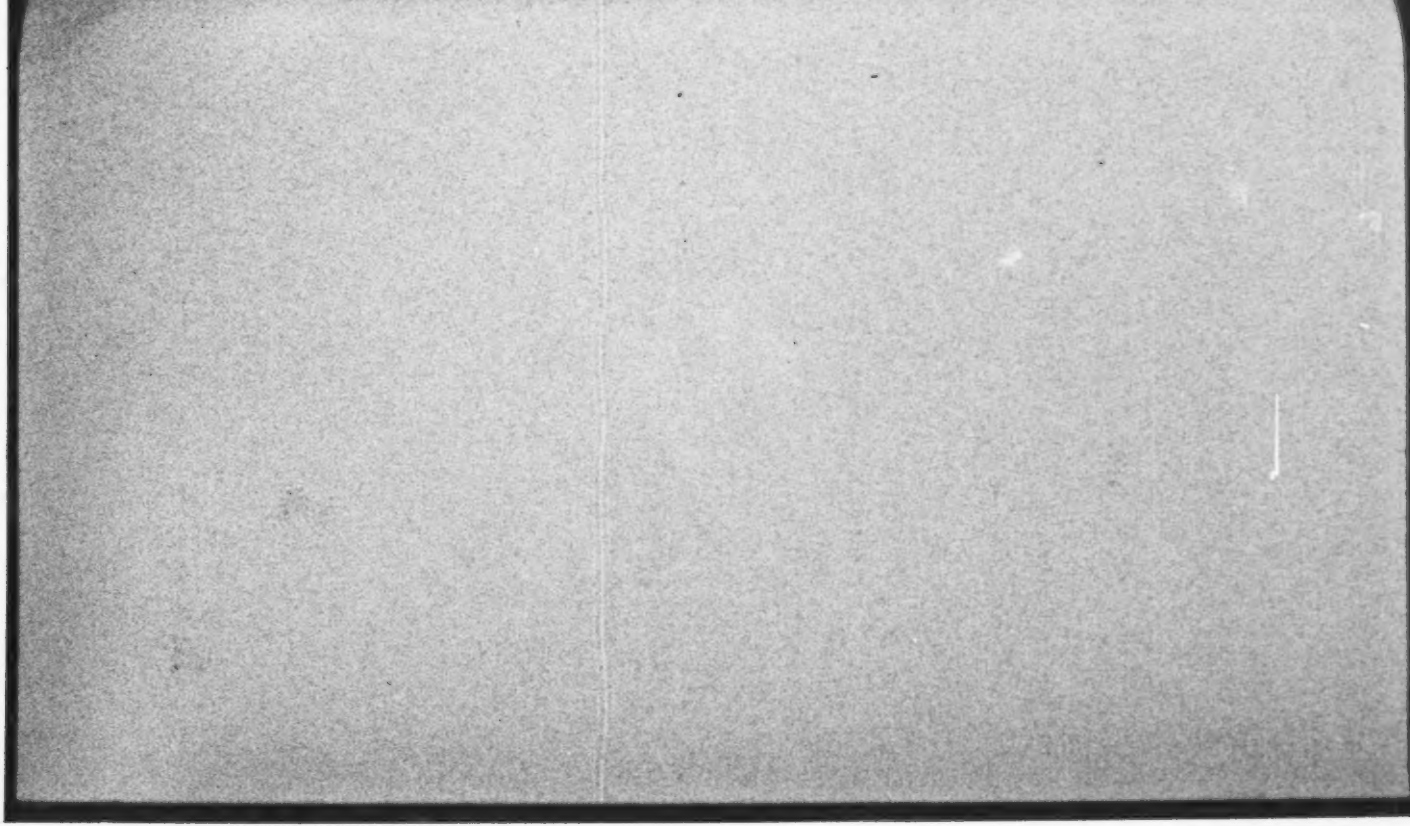

# APPENDIX NO. I.

## THE HISTORICAL DEVELOPMENT OF THE DOCTRINE OF LIMITATION OF LIABILITY OF SHIPOWNERS.

## APPENDIX NO. 1.

### HE HISTORICAL DEVELOPMENT OF THE DOCTRINE OF LIMITATION OF LIABILITY OF SHIPOWNERS.

The words "Maritime Law", as commonly used to-
y, denote that part of the whole law which deals
iefly with the legal situations arising from the use of
ips. But in an earlier period, the Law Maritime had
considerably wider scope. It dealt not merely with
e modern admiralty law, but also with the primitive
cestors of many branches of our modern commercial
w; dealt, too, with the germs of that public law which
today style International Law.

In a large sense the early maritime law might well
ve been called the private (and to some extent the pub-
) international law of its day, a law perhaps not
ternational, but supernational, a visible proof of the
bstantial unity of the great *Res Publica Christiana.*
his feature seems the more striking to us today, but
would probably not have seemed to be at all unusual
the mediaeval student.

Nor, in a still earlier day, would the unity of custom,
e unity of action, the unity of thought, that gave unity
the mediaeval customs on which the mediaeval laws
ere originally based, have been thought any more re-
arkable.

It has been justly observed that the Roman lawyer
uld have had no conception of International Law as
e comprehend its meaning today. Sir Henry Maine has

pointed out that the Roman concept of *Jus Gentium* conveyed ideas quite different to a Roman from those conveyed to, let us say, *Grotius*:

> "Whenever a particular usage was seen to be practiced by a large number of separate races in common, it was set down as part of the *law common to all nations*, or *Jus Gentium* * * *".

The *Jus Gentium* was accordingly a collection of rules and principles, determined by observation to be common to the institutions which prevailed among the various Italian tribes.

It is in this sense of "law common to all nations" that the present subject must be considered, and it is in this sense that England and America have given their adherence to this greater common law. Perhaps, as has been well suggested, the best adjective to apply is "cosmopolitan", but the idea desired to be conveyed will be quite clear.

There is probably no other legal subject whose rules are as uniform and as universal as the Maritime Law. That this should be so is not strange when one considers that the law exists to regulate human conditions, to govern human necessities, and that the conditions and necessities of those who go down to the sea in ships are well nigh universal without respect to race, climate or creed.

Maritime laws are not bound by the form of governments, by the prejudice of castes, by the instinct of races, by the special customs of different nations; they are founded, before everything, on the necessities of mari-

time navigation, for the most part unchangeable. Maritime laws everywhere arise under similar conditions in order to satisfy similar needs, by the very nature of things.

In the Middle Ages the same principles were to be found flourishing throughout Europe in almost every branch of the law, but with the rise of the modern nations this treasured uniformity was almost lost. Almost, but not quite, lost, since the maritime law has, because of its peculiar necessities, preserved its international uniformity until the present day. For this reason, when any fundamental principle of the maritime law is to be considered in any country it is compulsory upon the conscientious inquirer to examine the interpretation of the question at issue as given in the jurisprudence of other countries.

"Uniformity", it has been said in modern days, "is of their essence" (*"L'uniformité est de leur essence," Pardessus,* and also *Desjardins, Droit Commercial Maritime,* p. 2), and as long ago as 1473 the English courts held them to be "the universal law throughout the world". *Y. B. 13, Edw. IV. Pasch. pl. 5—secundum legis natura qu'est appele par ascuns ley Marchant, que est ley universal per tout le monde.*

This is as true of the doctrine limiting the liability of shipowners as of most of the other doctrines of Maritime Law, and this particular doctrine has been universally established since the fourteenth century.

If it cannot be traced back further the reason is not far to seek. In Roman times maritime commerce was

chiefly in the hands of the Imperial Government, and the ensuing Dark Ages were not favorable to the development of legal principles.

But in the fourteenth century there was a great expansion of commerce and trade, and with its growth the law grew concurrently—*Holdsworth, History of English Law,* Vol. V., Ch. 3. It was at this time that the doctrine of limited liability appeared and gained the universal acceptance which it has held for the past six centuries, as will be shown below.

Limitation of liability is not to be found in the Roman Law but the wrongdoer in collision must make full compensation. The owner of a vessel was personally bound for all the acts of the master falling within the range of his authority as master. He was also responsible for the acts of the master, while engaged in the discharge of his functions as master, as well *ex delicto* as *ex contractu.* If there were several owners each was bound individually for the full amount of the obligations of the master arising from contracts. But for obligations arising from tort, each was bound only for his part, that is, in proportion to the interest he had in the ship.

Dig. 4. 9.
Dig. 14. 1. 1.
Dig. 14. 1. 2.
Dig. 14. 1. 5.
Dig. 44. 7. 5.
Dig. 45. 5. 1.
*Emerigon, Contracts à la Grosse,* c. 4, §11.

This rule of unlimited liability of the Roman Law seems to have been followed by the earlier mediaeval codes, but in the case of inevitable accident it seems to have been modified by the rule of division of loss. In some later codes there are traces of the rule of division of loss being extended to cases of collision by negligence. Swedish Maritime Law, III *Pardessus* 129, 173, 174: Art. 51, Dantzig Sea Laws, IV Bl. Bk. Adm., 349, of the early fifteenth century.

The doctrine of limitation of liability is not to be found in the earlier mediaeval codes nor in any codes which are at an earlier state of legal development. There are certain codes to be found in the north of Europe which have copied the earlier codes of southern Europe, and although these northern codes are later in date they represent an arrested stage of legal development, so that southern codes contemporaneous with these later codes represent a more advanced stage of legal development. Such northern codes are the Wisby Sea Laws, the Gothland Code and the Hamburg Code.

By the earliest codes in use in southern Europe the wrongdoer in the case of collision is generally liable to pay full damages, but the rule of division of loss in collision is apparent from the first. This rule as to the division of loss in case of collision assumes that but for its existence the ship run down would recover all the damages, but it must be said here that the mediaeval rules as to collision are in a very primitive state of development, and nowhere does one meet with the idea of the apportionment of negligence. There is little about collision in the Mediterranean codes.

These earliest codes date approximately from the end of the twelfth century and throughout the thirteenth century. Such codes are the *Rolls of Oleron,* the *Judgments of Damme,* the *Laws of Westcapelle,* the Wisby Sea Laws, the Gothland Code, and the Flanders Sea Laws.

I. Black Book Adm., p. 108.
II. Black Book Adm., pp. 229, 449.
IV. Black Book Adm., pp. 87, 126, 373, 456.

Under the rules of the English Admiral, drawn up between 1337 and 1351, the wrongdoer in a collision is to make full compensation. (*De faire plaine amende,* I Black Book Adm., p. 38).

During the fourteenth century there was a tremendous increase in commerce and in sea travel and in accordance with this, towards the close of the fourteenth century, the maritime law began an important development and newer and more elaborate provisions appeared to take the place of the older and simpler rules which were suited to earlier and more primitive conditions. Public policy, the economic advantage of the state and primitive economic theories appear for the first time and, in a similar and related field, the development of the contract of insurance is conditioned in exactly the same way, at exactly the same period, by public policy and by economic ideas. See *Bensa, Il Contratto di Assicurazione nel Medio Evo,* pages 84 to 86.

Under the newly developing rule ship owners were severally bound for the acts of the master, whether of

tort or contract, but the extent of their liability was limited to the value of the ship. The creditors had always their remedy against the vessel, and through that each owner was liable, but not beyond his share in the vessel.

That this was the settled law of the Mediterranean is abundantly shown in the CONSULATE OF THE SEA, which governed the maritime commerce of southern Europe, and whose final recension appears to date from the close of the fourteenth century.

In *Chapter 194*, it is said that if the master borrows money for the necessities of the ship, in a place where the owners do not reside, the whole ship shall pay the loan, and no part owner can object. But if the ship is lost before the loan is paid, no part owner is bound to pay anything.

In *Chapter 141*, if goods are lost or injured through being laden on deck without the consent of the shipper, and the master has not the means of paying, the ship shall pay. But the owners shall not be liable except for the amount of their shares in the ship. The same principle is again stated in *Chapter 162*, in case of injury to goods by the want of proper apparel or rigging for the vessel.

By the rules in the Consulate, in addition to the direct liability of the master himself, the vessel was tacitly hypothecated for the obligations contracted by him, whether by contract or by tort, but there resulted from them no personal liability to the owners.

"In all damages which are here and shall be mentioned in the chapters of the sea, the master

supports his part of what the ship pays, and each part owner his part, for the ship pays the whole." *Ch. 27. III. Black Book Adm. 102.*

That the legal situation has now changed from primitive times is shown by the fact that one meets with the distinction between torts and contracts.

Torts. The wrongdoer shall pay full damages. (Chapter 155, *E si dan li fa, deulo li tot esmenar a restituir.*) But if the collision is accidental the ship owner shall not be held liable because it is not his fault. (Chapter 155, *no li sia tengut de esmenar tot lo dan . . . per co car no es sa culpa.* Also *Chapter 158*).

Contracts. Owners other than the managing owner are not liable to a merchant for the loss of his goods except to the extent of their shares, unless one can impute to them privity to some fault, as, where the ship's equipment is defective. *Chapters 18, 141, 182, 194.*—III Black Book Admiralty, pp. 93, 245, 344, 381. At this early period one can already see a provision that is to be found incorporated in the statutes in force today. Upon contracts with reference to the ship, entered into by his agent, the liability of the shipowner is limited to the value of the ship. Here as regards contracts we already have at the end of the fourteenth century all the essential provisions of the modern doctrine respecting limitation of liability.

Many origins have been suggested for the doctrine of limited liability, but it seems plain that its origin is mediaeval and to be found in the Mediterranean Sea. *Fremery,* in his *Etudes de Droit Commercial,* c. 27, traces

the origin of this principle to the contract of *commenda*. Such also is the opinion of Marsden, an author whose historical opinions are to be received with the greatest deference.

> "The contract of *commande*, or joint adventure of shipowners and merchants, corresponding in some respect to the *societe en commandite*, or partnership with limited liability, of modern times, is perhaps the origin of the widespread doctrine of limited liability of shipowners. This kind of association extensively prevailed in the Mediterranean in the Middle Ages, and is frequently mentioned in the *Consolato del Mare*." *Marsden, Collisions at Sea*, 8th Edition, pp. 167, 168.

An analogy is also sought to the Roman action of *noxae deditio* which seems to personify any inanimate object by means of which the injury is done and to identify it with the actual wrongdoer.

*Bynkershoek, Quaest. Jur. Priv.* l. 4. c. 20.

The principle of *deodand* has also been thought to be founded on the same idea and its chief exponent in this country is Mr. Justice Holmes. See his book on the Common Law, page 30. He also cites in the *Liverpool, etc. Navigation Company* case the rule in the time of Edward III—

> "If my dog kills your sheep and I freshly after the fact tender you the dog you are without recourse against me." Fitz. Abr., Barre, 290.

It seems probable that in *Liverpool, etc. Navigation Company* v. *Brooklyn Terminal,* 251 U. S. 48 (1919), counsel for the petitioner had this idea in mind in urging that the car float be surrendered because "she was the vessel which actually did the damage" but Justice Holmes held, at page 52, that "the passive instrument of the harm does not become one with the actively responsible vessel by being attached to it."

*The James Gray* v. *The John Fraser,* 21 How. 184.

*The J. P. Donaldson,* 167 U. S. 599, 603, 604.

*The Eugene F. Moran,* 212 U. S. 466, 474, 475.

*Union S. S. Co.* v. *Owners of the "Aracan",* L. R. 6, P. C. 127.

The rule is not changed by the ownership of the vessels.

*The John G. Stevens,* 170 U. S. 113, 123.

*The W. G. Mason,* 142 Fed. Rep. 913, 917. Also 212 U. S. 466, 475 and L. R. 6, P. C. 127, 133.

It seems probable that *deodand* is not the origin of the principle of limited liability, in view of the historically unchallenged opinion that the early medieval law originated on the Continent of Europe and, in all probability, about the Mediterranean. In this opinion Marsden agrees (*Collisions at Sea,* 8th Edition, page 168).

"No trace of it is to be found in the Digest of the Roman Law, nor in the maritime legislation

of the Eastern Empire, nor in the compilation which goes under the name of the 'Rhodian Law', a work which, though not entitled to the name which it has received, is undoubtedly a work of high antiquity, and of an earlier date than any of the maritime codes of western Europe. It originated in the maritime usages of the Middle Ages, and more particularly in the Mediterranean, where commerce first acquired activity and extension after the fall of the Western Empire. In Italy and the southern ports of France and Spain the custom seems to have been nearly coeval with the revival of maritime commerce. That it had its origin in the Mediterranean, and probably in Italy, the cradle of the modern law merchant, appears from the fact that no traces of it are to be found in the Laws of *Oleron*, a code earlier than the Consulate, at least in the form in which we now have it, and which constitutes the basis of the maritime law of the western parts of Europe; nor is there any indication of it in any of the earlier codes which were derived from this primitive compilation." *The Rebecca*, Fed. Case, 11619.

Continental law from the beginning of modern times seems consistently to have considered the principle of limited liability as being inherent by its very nature in the Law Maritime.

The law of Holland has always limited the responsibility of owners, and discharges them from all personal liability, upon their abandoning their interest in the ship to the creditors. *Hugo Grotius* says that the principle of the Roman Law was never enforced there, and he condemns it as both inequitable and injurious to the inter-

ests of trade. As early as 1625 he advocated the limitation of liability upon grounds of public policy in connection with protectionist doctrines. He tells us that the limitation of liability had been applied in his day and long before, in Holland, and he approves of the principle as being agreeable to justice and necessary to encourage shipping. *De Jure Belli ac Pacis,* L. 2, ch. 11, Sec. 13. *"Apud Hollandos ubi mercatura pridem maxime viguit . . . et nunc et olim constitutum ne exercitoria etiam universi (exercitores) amplius teneantur quam ad aestimationem navis, et eorum quae in navi sunt. . . . Absterrentur enim homines ab exercendis navibus si metuant ne ex facto magistri quasi in infinitum teneantur."*

The support of this doctrine by *Grotius* upon grounds of public policy is in complete accord with the principles underlying the entire earlier growth of the maritime law.

The doctrine of *Grotius* applied expressly only to contracts, but Marsden thinks it applied to torts also. *Collisions at Sea,* 8th Edition, page 168.

The custom which exempted the owners from personal responsibility for the acts of the master, extended, as has been observed, as well to obligations arising from contracts as from torts. No distinction was made between them, and on the principles upon which the custom stood in its origin and in the time of the Consulate of the Sea, there does not appear to be any just ground for such a distinction. *The Rebecca,* Fed. Case, 11619.

By the statutes of Hamburg (statute of 1603, tit. 18, art. 3) it was established that if the owners chose to abandon the ship, the creditors could demand nothing more

nor touch other property of the owners unless they had specially bound themselves.

The Hanseatic Ordinance of 1644 pronounced the goods of the owner discharged from claims for damages by the sale of the ship to pay them.

The Law of Sweden was equally explicit, and to the same effect as the statutes of Hamburg (Maritime Code of Charles II, 1667, pt. 1, c. 16). According to *Emerigon*, such was the established jurisprudence of the north of Europe. *Contrats à la Grosse*, c. 4, §11.

The definitive modern European rule was established by the promulgation of the famous French *Ordonnance de la Marine* in 1681. This celebrated *ordonnance* was formed upon all the previous maritime codes, ancient and modern, corrected, as is said, by particular information obtained at the time, of the actual maritime jurisprudence of all Europe, and in all questions in this branch of the law it has always been considered as of the highest authority. In such respect was it held on its first appearance, that *Valin*, in the preface to his Commentary, says that it became at once the universal law of maritime nations.

By the provisions of this code the owners of the ship were to be answerable for the acts of the master, but they were to be discharged from their liability by abandonment of their vessel and the freight.

> *"Les proprietaires de navires seront responsable des faits du maitre; mais ils en demeureront déchargé en abandonnant leur batiment et le fret." Liv. 2, tit. 8, art. 3.*

See

*Boulay Paty, Cours de Droit Commercial Maritime,* 1, 270-6, cited 6 How. 344, 415.

This article was merely an affirmance of the pre-existing law. *Cleirac, Navigation des Rivières,* art. 15, p. 502.

The earlier French law in any case freed the owner from all personal liabilities arising *ex delicto*—

*Emerigon, Contrats à la Grosse,* c. 4, §11.
*Pothier, Des Obligations,* No. 452.
*Pothier, Contrats Maritimes,* No. 51.

—but there was formerly some dispute as to whether it freed the owner from personal liability arising from contracts made by the master. This was set at rest by the broad and sweeping reenactment of the law in 1885, so that today the French shipowner can free himself *even as against the State* from any liability whatsoever to which he was not personally privy.

*Boulay Paty, 1, Cours de Droit Commercial Maritime,* p. 269.
*Code de Commerce Francais, Edition Dalloz,* 1924, p. 169, and ib., note 1.

*Valin,* in his commentary on this passage, after specifying certain engagements of the master which are binding on the owners, without any limit of responsibility, such as contracts for the benefit of the vessel, made during the voyage (except contracts of bottomry), says:

"With these exceptions it is just that the owner should not be bound for the acts of the master,

except to the amount of the ship and freight. Otherwise he would run the risk of being ruined by the bad faith or negligence of his captain, and the apprehension of this would be fatal to the interests of navigation. It is quite sufficient that he be exposed to the loss of his ship and of the freight, to make it his interest, independent of any goods he may have on board, to select a reliable captain."

By the Ordinance of Rotterdam, 1721, the owners shall not be answerable for any act of the master done without their order any further than the value of their share in the ship; by other articles it is provided that each part-owner shall be liable for the value of his own share.

*Vinnius* states that by the law of the land the owners were not chargeable beyond the value of the ship and the things that were in it. *The Main* v. *Williams,* 152 U. S. 126.

Limiting rules are to be found in almost all of the modern foreign maritime codes.

1. French Code of Commerce, Article 216.
2. German Maritime Code, Article 486.
3. Code of the Netherlands, Article 321.
4. Belgian Code, Articles 46 and 47.
5. Italian Code, Article 491.
6. Imperial Russian Code, Article 649.
7. Spanish Code, Article 587.
8. Portuguese Code, Article 492.
9. Scandinavian Code, Articles 7 and 8.

10. Argentine Code, Article 1039.
11. Brazilian Code, Article 494.
12. Chilean Code, Article 879.

Most of the modern codes follow the French *Ordonnance de la Marine* of 1681 with slight changes of phraseology. Nevertheless, they fall into three lesser subdivisions, namely,

1. The French Rule;
2. The German Rule;
3. The Belgian Rule.

At the outset, it should be recalled that the principle of the legal limitation of liability of the owner seems so much imposed by practical necessities that it is recognized by all the legislation. Monsieur *Ripert*, the author of the *Traite de Droit Maritime*, No. 1228, Vol. 2, 2nd Ed., expresses himself as follows:

> "All the legislations admit that the owner should not be responsible for the act of his maritime representatives to the extent of the whole of his fortune. All the legislations made a distinction and expose his maritime fortune to the suit of the creditors, but safeguard his fortune on land."

Such is the fundamental distinction which is repeatedly found in all the legislations.

The leading provisions, as would be expected, are those of the French Code of Commerce, Article 216. As

originally drawn up, it followed the provisions of the Code of 1681, and read as follows:

> "Every owner of a vessel is civilly liable for the acts of the captain with respect to the ship and the voyage. The liability ceases through the abandonment of the ship and of the freight."

This article, as has been stated, was amended by the law of the 14th of June, 1841, and was finally enacted in its present form by the law of the 12th of August, 1885. It now reads as follows:

> "Every owner of a vessel is civilly liable for the acts of the captain and bound by the obligations contracted by the latter, with respect to that which relates to the ship and the voyage."
>
> "He can, in all cases, divest himself of the above obligations by the abandonment of the ship and the freight."
>
> "In all cases, the option to make an abandonment is not extended to one who is at the same time captain and owner or co-owner of the ship. When the captain is only co-owner, he shall be responsible for the obligations contracted by him for that which relates to the ship and the voyage, only to the proportion of his interest."
>
> "In case of shipwreck of the vessel in a seaport, or harbor, in a maritime port, or in the waters which serve as access thereto, or in case of damage caused by the vessel to the port-works, the owner of the vessel can divest himself, even as against the State, of all the expenses of raising or of repairing, and also of all damage claims, by the abandonment of the vessel and the freight of the merchandises aboard."

> "The same option belongs to the captain who is owner or co-owner of the ship, unless it is proved that the accident was occasioned by his personal fault."

It follows from this text that in theory, the owner, like all principals, is personally liable for the acts of the captain and crew; but, although he who is liable is generally liable to the extent of his whole personal fortune, the owner of a French vessel enjoys the advantage of a limitation of liability. This privilege is exercised by abandoning the physical possession of the ship, and by giving up the freight earned.

The French system of abandonment is adopted and substantially followed by the Commercial Code of the Netherlands, Article 321; by the Italian Commercial Code, Article 491; by the Spanish Commercial Code, Article 587; and by the Portuguese Commercial Code, Article 492. The Codes of Argentina, Brazil and Chile follow those of Spain and Portugal.

The limitation of liability of the shipowner under German Law is provided for by Article 406 of the Commercial Code, according to which:

> "The ship-owner is not bound as to third persons, to the extent of his personal fortune, but only to the extent of the ship and the freight, (1) when the action is founded on an act which the captain has done in that [his] capacity . . . ; (2) when it is founded on the non-performance or defective performance by the captain of a contract entered into by the ship-owner; (3) when it is based on the wrongful act of a person belonging to the crew."

This system arrives at almost the same result as in France, although it rests upon a different theoretical view. In France, as has been shown, it is admitted on principle that the owner is personally liable, but that he has the right to limit his personal liability by invoking the benefit of the option of abandonment.

On the contrary, in Germany, the shipowner is not personally liable, or, more precisely, his liability is purely *in rem*. His maritime holdings alone are obligated, with the result that the shipowner need not make an abandonment. Each ship is the center of a separate maritime holding. The more ships a shipowner possesses, the more maritime holdings he possesses.

Each maritime creditor has a direct right of action against the ship, that is to say, against a maritime holding, but he has no action against the land property of the shipowner.

A conception analogous to that of the German Law is sanctioned by Articles 7 and 8 of the Scandinavian Maritime Code.

The Belgian view is characterized by the fact that it constitutes a sort of juxtaposition of the French view of abandonment in kind, the American view of abandonment of the value of the ship, and the English view of a penal limitation of liability.

The Belgian Law of February 10, 1908, follows very closely the project which was drawn up relative to the liability of the owner of a vessel by the International Maritime Committee at its International Conference at Brussels in 1905.

Articles 46 and 47 of the Belgian Law are drawn up as follows:

Article 46—

"Every owner of a vessel is civilly liable for the acts of the captain and bound by the obligations contracted by the latter in the exercise of his function; he is civilly liable for acts of the crew and his representatives done in the exercise of their respective functions."

"He may, in all cases, free himself from these obligations and the expenses and damages due by reason of assistance or salvage, by the abandonment of the ship and the freight."

Article 47—

"The owner may substitute for the abandonment of the ship, the payment of its value at the end of the voyage or a corresponding sum, for each voyage at (the rate of) two hundred francs per ton of the gross tonnage of his vessel."

"He may not use this latter option to free himself from the expenses and damages due by reason of assistance or salvage."

"The preceding provisions shall not prejudice the right of the creditors to seize the ship, for purposes of conservation, in the course of a voyage, or to demand security."

Thus the owner of a ship is considered as personally liable for the acts and obligations of the captain, and on this point, the Belgian law follows the French system, but the owner who is liable may free himself of his obligation either by (1) the abandonment of the ship and the freight, as in France, (2) the payment of the value of the ship at the end of the voyage, as in America, or (3)

the payment of a penal sum per ton of tonnage, as in England.

The Belgian system has been followed almost literally by Articles 53 to 64 of the Greek Maritime Code of 1910.

Such are the general principles according to which continental maritime legislations have arranged the limited liability of the owner of a ship.

Nevertheless, although the continental rules differ in some particulars as to the means by which a shipowner may free himself from liability, they are all in agreement on the general principle by which the owner cannot be held liable to maritime creditors beyond a limited value corresponding approximately to his maritime investment in the particular ship.

By the common law of England, and by the maritime law as administered in the Court of Admiralty there, the liability of shipowners for damages was unlimited until 1734.

*Wilson* v. *Dickson*, 2 B. & Ald. 2;
*The Dundee*, 1 Hagg. 109, 120;
*The Aline*, 1 W. Rob. 111;
*The Mellona*, 3 W. Rob. 16, 20;
*The Wild Ranger*, Lush., 553, 564;
*Cope* v. *Doherty*, 4 K. & J. 367, 378;
*The Volant*, 1 W. Rob. 383, 387;
*The Scotland*, 105 U. S. 24, 28;
*The Great Western*, 118 U. S. 520, 534;
*The Main* v. *Williams*, 152 U. S. 122;
*La Bourgogne*, 210 U. S. 95, 116.
*Abbott's Law of Merchant Shipping*, 14th Ed., 1045.

In 1734 was passed the Act of 7 George II, c. 15, which limited liability for loss of cargo by the theft and embezzlement of the master or of the crew to the value of the ship and the freight.

The history of the passage of the Act was as follows:

As early as the fifteenth or the beginning of the sixteenth century, a petition asking for an alteration in the law by which shipowners were made liable for damage done by their ships when the owners were not on board, was presented to Parliament. It was not successful. *Ancient Petitions*, 6264.

The situation was brought to a head during the later development of English commerce by the case of *Boucher* v. *Lawson*, *Cas. Temp. Hardw.* 85, 95, English Reports 53, 125. By this case, shipowners were held liable for the loss of a cargo of coin taken on board in Portugal and afterwards stolen by the master.

This decision caused great consternation among the English shipowners.

This is clearly the case referred to in the petition of the shipowners, as set forth in the Journals of the House of Commons, Session of 1733, Page 244, 95 English Reports, Page 55, Note 3. In this petition, the shipowners complained that owners of ships were exposed to no such hazards in other trading nations, and they complained that they did not believe themselves liable to any greater loss than that of the ship and its freight; they requested relief on the ground that otherwise trade and navigation would be greatly discouraged because the shipowners would find themselves exposed to ruin without any fault on their own part.

Parliament appears to have been influenced by this petition and particularly by the fact that laws similar to that asked for were in existence in Holland and in other seafaring countries on the continent. See *per* Lord Stowell, *The Dundee* (1823), 1 Hag. Ad. 109, 121; *per* Abbott, J., *Gale* v. *Laurie* (1826), 5 B. & C. 156, 163; *per* Lord Blackburn, *Stoomvaart &c.* v. *P. & O. St. Nav. Co.*, 7 App. Cas. 795, at 812. See 95 English Reports, p. 55, note 3, further.

There does not appear to have been any considerable discussion in Parliament upon the principle of either this or the subsequent acts limiting the liability of the shipowners, for the merits of the act requested seems to have appeared very obvious. See *Common's Journals*, Vol. 68, Page 670: 133 *Hansard's Parl. Deb.*, Pages 574 and following. Little was said as to principles or policies even in the debates over the Merchant Shipping Act in 1862. *Hansard*, 165 Page 1932: 166, Pages 1217 and following: 167, Pages 735, 750: 168, Pages 1 and following.

By subsequent acts, this limitation of liability was extended to losses in which the master and mariners had no part, to losses by their negligence and to losses by collision—an entire exemption from loss or damage by fire, or loss of gold and jewelry was granted, unless its nature and value was disclosed by the shipper. Act of 26 George III, c. 86 (1786); Act of 53 George III, c. 159 (1813).

The Merchant Shipping Act, 1854, 16 & 17 Vict., c. 131, extended the principle to cases of loss of life and personal injury and provided that in such cases the value of the ship should be taken at eight pounds per ton, ex-

cept in the case of loss of life, where it should be taken at fifteen pounds per ton. This principle has been further extended by the Merchant Shipping Amendment Act, 1862, 25 & 26 Vict., and the principle has been re-enacted and extended by the following Acts:

Merchant Shipping Act, 1894, 57 and 58 Vict. c. 60.
Merchant Shipping Act, 1898, 61 and 62 Vict. c. 14.
Merchant Shipping Act, 1900, 63 and 64 Vict. c. 32.
Merchant Shipping Act, 1906, 6 Edw. VII, c. 48.
Merchant Shipping Act, 1921, 11 and 12 Geo. V, c. 28.

The important provisions of the Merchant Shipping Act are Sections 502, 503 and 504, which read as follows:—

"*Section 502.* The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely;—

(i) where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship; or

(ii) where any gold, silver, diamonds, watches, jewels, or precious stones taken in or put on board his ship, the true nature and value of which have not at the time of shipment been declared by the owner or shipper thereof to the owner or master of the ship in the bills of lading or otherwise in writing, are lost or damaged by reason of any robbery, embezzlement, making away with, or secreting thereof.

*Section 503.*—(1) The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; (that is to say),

(a) Where any loss of life or personal injury is caused to any person being carried in the ship;

(b) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship;

(c) Where any loss of life or personal injury is caused to any person carried in any other vessel by reason of the improper navigation of the ship;

(d) Where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship;

be liable in damages beyond the following amounts; (that is to say),

(i) in respect of loss of life or personal injury, either alone or together with loss of or damage to vessels, goods, merchandise, or other things, an aggregate amount not exceeding fifteen pounds for each ton of their ship's tonnage; and

(ii) in respect of loss of, or damage to, vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage.

(2) For the purposes of this section,—

(a) The tonnage of a steamship shall be her *registered tonnage with the addition of any engine room space deducted for the purpose of ascertaining that tonnage;* and the tonnage of a sailing ship shall be her registered tonnage: Provided that there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use, which is certified under the regulations scheduled to this Act with regard thereto;

(b) Where a foreign ship has been or can be measured according to British law, her tonnage, as ascertained by that measurement shall, for the purpose of this section, be deemed to be her tonnage;

(c) Where a foreign ship has not been and cannot be measured according to British law, the surveyor-general of ships in the United Kingdom, or the chief measuring officer of any British possession abroad, shall, on receiving from or by the direction of the court hearing the case, in which the tonnage of the ship is in question, such evidence concerning the dimensions of the ship as it may be practicable to furnish, give a certificate under his hand stating what would in his opinion have been the tonnage of the ship if she had been duly measured according to British law, and the tonnage so stated in that certificate shall, for the purposes of this section, be deemed to be the tonnage of the ship.

(3) The owner of every sea-going ship or share therein shall be liable in respect of every such loss of life, personal injury, loss of or damage to vessels, goods, merchandise, or things as aforesaid arising on distinct occasions to the same extent as if no other loss, injury, or damage had arisen.

*Section 504.* Where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of loss of life, personal injury, or loss of or damage to vessels or goods, and several claims are made or apprehended in respect of that liability, then, the owner may apply in England and Ireland to the High Court, or in Scotland to the Court of Session, or in a British possession to any competent court, and that court may determine the amount of the owner's liability and may distribute that amount rateably among the several claimants, and may stay any proceedings pending in any other court in relation to the same matter, and may proceed in such manner and subject to such regulations as to making persons interested parties to the proceedings, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of any costs, as the court thinks just."

Authorities giving the history of the development of the British law on the limitation of a ship owner's liability, at more length, are:

*The Volant,* 1 W. Rob. 383, 387.
*The Carl Johan,* 1 Hagg. Adm. 113.
*The Dundee,* 1 Hagg. Adm. 109, 120, 121.

*The Mellona*, 3 W. Rob. 16, 20.
*Wilson* v. *Dickson*, 2 B. & Ald. 2.
*The Amalia*, 1 Moore P. C. (N. S.) 471, 32 L. J. Ad. 191, B & L. 151.
*Chapman* v. *Nav. Co.*, 4 P. D. 157.
*The Andalusian*, 3 P. D. 182, 189.
*The Main* v. *Williams*, 152 U. S. 122.
*Temperley & Moore*, 2nd Ed., p. 292.
*Maclachlan*, 5th Ed., 126.
*Abbott's Law of Merchant Shipping*, 14th Ed., 637.

The English statutes contain no provision for surrender and assignment of the ship and its freight, but only for paying their value into the court.

The history of the American statute is similar to that of the English act, because it, too, was passed in consequence of a decision affecting adversely the interest of the shipowners.

Before the act of Congress was passed limiting liability, statutes had been passed by the states of Massachusetts and Maine, and both statutes were derived from the original English statute. That of Massachusetts was passed in 1818 and revised in 1836; that of Maine was passed in 1821 and followed the earlier statute of Massachusetts. I Laws of Maine, c. 14, Section 8—by abandoning the ship and its freight, the shipowner was discharged from all personal responsibility. These statutes limit the liability of the shipowner to the amount of his interest in the ship and freight for any embezzlement or damage occasioned by the master or mariners without his privity or knowledge.

In the case of the *New Jersey Steam Navigation Company* v. *Merchants' Bank*, 6 How. 344, 1848, the owners of the Steamship *Lexington*, which was burnt on Long Island Sound as a result of negligence, couped with defective equipment, were held liable for $18,000 of coin lost in the disaster, in spite of the express stipulation of the carriers with the expressman, (of which the owners of the coin, who contracted only with the expressman, had notice), that they were not in any event to be responsible for loss.

> "In consequence of the uneasiness produced among ship owners by this decision, and for the purpose of putting American shipping upon an equality with that of other maritime nations, Congress, in 1851, enacted what is commonly known as the Limited Liability Act". *The Main* v. *Williams*, 152 U. S. 122, 128.

The act of Congress appears to have been passed in the light of the previous legislation in England, in Maine, in Massachusetts, and in France, as far as the Amending Law of 1841, to which reference has been made. *Norwich Company* v. *Wright*, 80 U. S. 104, 119. The purpose of our Limited Liability act was to change the position of, and to confer a benefit on, American shippers and shipowners competing with those of England and other foreign nations.

*La Bourgogne*, 210 U. S. 95, 120.
*Richardson* v. *Harmon*, 222 U. S. 96, 103.
*Moore* v. *American Transportation Company*, 24 How. 1, 39.

*Providence & N. Y. S. S. Co.* v. *Hill Manufacturing Co.*, 109 U. S. 578, 588.
*The Main* v. *Williams*, 152 U. S. 122, 128.
*Chamberlain* v. *Transp. Co.*, 44 N. Y. 305.

By the passage of the Act of 1851, and of the Amending Acts of 1884 and 1886, American law was thereby brought into conformity with the maritime laws of all the other maritime nations. That this principle of limited liability is based upon sound economic theories, and upon universal legal usage, is attested by the experience of every other important country.

> "The general sense of the commercial world seems to be satisfied with holding the owners of vessels responsible to the extent of their interest in the ship, and by abandoning the ship and freight to the creditors, they are discharged. This has for a long period, if I am not mistaken, been the law of all the maritime nations of the continent of Europe" *per* Ware, D. J., in *The Rebecca*, Fed. Cas. 11619, p. 380.

To recapitulate. The purpose of such legislation;—it is imposed by practical necessities which are recognized by the legislation of every maritime country, and these laws are legislative enactments of a common and universal international principle which has been established in the customary law of every continental European country since the fourteenth century, as has been shown above. These necessities were specifically recognized by Parliament and by Congress and by the courts of these two countries.

Mr. Justice Nelson, in *Moore* v. *American Transportation Company*, 24 How. 1, refers to the purpose of the act in the following words, at page 39:

> "The Act was designed to promote the building of ships, and to encourage persons engaged in the business of navigation, and to place that of this country upon a footing with England and on the continent of Europe."

In *Norwich Co.* v. *Wright*, 13 Wall. 104, Mr. Justice Bradley, after explaining the origin of the Limited Liability Act of 1851, deals with the purpose of such legislation in these words (page 121):

> "* * * The great object of the law was to encourage ship-building and to induce capitalists to invest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. Those who are willing to manage and work ships are generally unable to build and fit them. They have plenty of hardiness and personal daring and enterprise, but they have little capital. On the other hand, those who have capital, and invest it in ships, incur a very large risk in exposing their property to the hazards of the sea, and to the management of seafaring men, without making them liable for additional losses and damage to an indefinite amount. How many enterprises in mining, manufacturing, and internal improvements would be utterly impracticable if capitalists were not encouraged to invest in them through corporate institutions by which they are exempt from personal liability, or from liability except to a limited extent?"

Again the same learned justice speaks of the Act of 1851 in *The Scotland*, 105 U. S. 24, at page 30, in the following words:

> "* * * This statute declares the rule which the lawmaking power of this country regards as most just to be applied in maritime cases. The great carrying trade by land is governed by substantially the same principle; being in the hands of corporate associations, whose members are not personally liable for acts of the employés, but risk only the amount of their capital stock in the corporation. The doctrine of *respondeat superior*, it is true, applies to the corporations themselves; but that does not interfere with the personal immunity of the shareholders. Whenever the public interest requires the employment of a great aggregation of capital, exposed to immense risk, some limitation of responsibility is necessary in order that men may be induced to contribute to the enterprise."

In *Butler* v. *Boston Steamship Co.*, 130 U. S. 527, at page 549, Mr. Justice Bradley gives as the ground of the law of limited liability of shipowners:

> "* * * That ground is, that for the encouragement of ship-building and the employment of ships in commerce, the owners shall not be liable beyond their interest in the ship and freight for the acts of the master or crew done without their privity or knowledge. It extends to liability for every kind of loss, damage and injury. This is the language of the maritime law, and it is the language of our statute which virtually adopts that law. * * *"

And at page 550:

"Various attempts have been made to narrow the objects of the statute, but without avail. It was first contended that it did not apply to collisions. This pretence was disallowed by the decision in *Norwich Company* v. *Wright*, 13 Wall. 104. Next it was insisted that it did not extend to cases of loss by fire. This point was overruled in the case of *Providence & New York Steamship Co.* v. *Hill Man'f'g Co.*, 109 U. S. 578. Now it is contended that it does not extend to personal injuries as well as to injuries to property. If this position can be maintained, the value of the act, as an encouragement to engage in the shipping business, will be very essentially impaired. The carriage of passengers in connection with merchandise is so common on the great highway between the old and new continents at the present day, that a law of limited liability, which should protect shipowners in regard to injuries to goods and not in regard to injuries to passengers, would be of very little service in cases which would call for its application."

*Richardson* v. *Harmon* seems to be the latest case in which the purpose and effect of these laws is dealt with at any length. In that case, Mr. Justice Lurton makes the following pertinent remarks at pages 103-104:

"• • • The avowed purpose of the original act was to encourage American investments in ships. This was accomplished by confining the owner's individual liability, when not the result

of his own fault, in the instances enumerated, to his share in the ship. * * *"

"* * * In view of the manifest policy of Congress to further encourage the ship-owning industry and the very broad terms employed in this last legislation, we can but infer that the policy of the Government was to confine the risk of an owner not personally at fault to his interest in the ship."

The legislation of every country, including England and the United States, has given the doctrine of limited liability the widest application and has extended it, as has been shown, to every possible legal relationship of the shipowner, except where he is personally and actually (never constructively) privy.

It is submitted, therefore, that where a principle has been for so long and so universally established in every country of the world as that of limited liability, and where its application has been for so long and so universally admitted to be based upon the fundamental needs of commerce and shipping, Congress would never have ventured to repeal it save in a manner the most definite and the most explicit,—Congress would never have repealed indirectly, by implication and without serious consideration, a law which it itself and the courts of this country, as well as the legislatures and the courts of every other country, have always recognized to be founded upon the most primary and self-evident necessities of sea-borne commerce.

# APPENDIX NO. II.

## TEXT OF STATUTES RELATING TO LIMITATION OF LIABILITY OF SHIPOWNERS, BEING THE ACT OF MARCH 3, 1851, AS AMENDED AND SUPPLEMENTED BY THE ACTS OF JUNE 26, 1884, AND OF JUNE 19, 1886.

## APPENDIX NO. II.

### Text of Statutes Relating to Limitation of Liability of Shipowners, Being the Act of March 3, 1851, as Amended and Supplemented by the Acts of June 26, 1884, and of June 19, 1886.

No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner (R. S. 4282).

The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, lost, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending (R. S. 4283).

Whenever any such embezzlement, loss, or destruction, is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her

freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto (R. S. 4284).

It shall be deemed a sufficient compliance on the part of such owner with the requirements of this Title (R. S. 4131-4305) relating to his liability for any embezzlement, loss, or destruction of any property, goods or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease (R. S. 4285).

The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this Title (R. S. 4131-4305) relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof (R. S. 4286).

Nothing in the five preceding sections (R. S. 4282-4286) shall be construed to take away or affect the rem-

edy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel (R. S. 4287).

Any person shipping oil of vitriol, unslacked lime, inflammable matches, or gunpowder, in a vessel taking cargo for divers persons on freight, without delivering, at the time of shipment, a note in writing, expressing the nature and character of such merchandise, to the master, mate, officer, or person in charge of the lading of the vessel, shall be liable to the United States in a penalty of one thousand dollars (R. S. 4288).

That the individual liability of a ship-owner, shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessel and freight pending: *Provided,* That this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said ship-owners (June 26, 1884, ch. 121, sec. 18).

**The provisions of the seven preceding sections (R. S. 4282-4288), and of section eighteen of an act entitled "An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying-trade, and for other purposes," approved June twenty-sixth, eighteen hundred and eighty-four, relating to the limitations of the liability of the owners of vessels, shall apply to all sea going vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal-boats, barges and lighters (R. S. 4289, June 19, 1886, ch. 421, sec. 4).**

# APPENDIX NO. III.

## RULES OF THE UNITED STATES SUPREME COURT RELATING TO THE LIMITATION OF LIABILITY OF SHIPOWNERS PROMULGATED DEC. 6, 1920. EFFECTIVE MARCH 7, 1921.

## APPENDIX No. III.

### Rules of the United States Supreme Court Relating to the Limitation of Liability of Shipowners Promulgated Dec. 6, 1920. Effective March 7, 1921.

51. Limitation of Liability—How Claimed.

When any ship or vessel shall be libeled, or the owner or owners thereof shall be sued, for any embezzlement, loss, or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, and he or they shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the act of March 3, 1851, entitled "An Act to limit the liability of shipowners and for other purposes" now embodied in sections 4283 to 4285 of the Revised Statutes, as now or hereafter amended or supplemented, the said owner or owners shall and may file a libel or petition in the proper district court of the United States, as hereinafter specified, setting forth the facts and circumstances on which said limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner or

owners, respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation with sufficient sureties or an approved corporate surety for the payment thereof into court with interest at the rate of six per cent. per annum from the date of said stipulation and costs, whenever the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisement make an order for the transfer by him or them of his or their interest in such vessel and freight to a trustee to be appointed by the court under the fourth section of said act; and, upon compliance with such order, the said court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage or injury, citing them to appear before the said court and file their respective claims at or before a certain time to be named in said writ, not less than thirty days from the issuing of the same; and public notice of such monition shall be given as in other cases, and such further notice served through the post office, or otherwise, as the court, in its discretion, may direct; and the said court shall also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect to any such claim or claims.

52. Proof of Claims in Limited Liability Procedure.

Proof of all claims which shall be filed in pursuance of said monition shall thereafter be made before a commissioner to be designated by the court, or before the court

as the court may determine, subject to the right of any person interested to question or controvert the same; and on the completion of said proofs, the commissioner shall make report, or the court its finding on the claims so proven, and on confirmation of said commissioner's report, after hearing any exceptions thereto, or on such finding by the court, the moneys paid or secured to be paid into court as aforesaid, or the proceeds of said ship or vessel and freight (after payment of costs and expense) shall be divided pro rata amongst the several claimants in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled.

53. Defense to Claims in Limited Liability Procedure.

In the proceedings aforesaid, the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel for said embezzlement, loss, destruction, damage or injury (independently of the limitation of liability claimed under said act), provided he, it or they shall have complied with the requirements of Rule fifty-one and shall also have given a bond for costs and provided that, in his or their libel or petition, he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have filed his or their claim under oath, shall and may answer such libel or petition, and contest

the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to a limitation of liability under the said act of Congress, or both, provided such answer shall in suitable allegations state the facts and circumstances by reason of which liability is claimed or right to limitation of liability should be denied.

54. Courts Have Cognizance of Limited Liability Procedure.

The said libel or petition shall be filed and the said proceedings had in any district court of the United States in which said ship or vessel may be libeled to answer for any such embezzlement, loss, destruction, damage or injury; or, if the said ship or vessel be not libeled, then in the district court for any district in which the said owner or owners may be sued in that behalf; when the said ship or vessel has not been libeled to answer the matters aforesaid, and suit has not been commenced against the said owner or owners, or has been commenced in a district other than that in which the said ship or vessel may be, the said proceedings may be had in the district court of the district in which the said ship or vessel may be, and where it may be subject to the control of such court for the purposes of the case as hereinbefore provided. If the ship shall have already been libeled or sold, the proceeds shall represent the same for the purposes of these rules.

55. APPEALS IN LIMITED LIABILITY CASES.

All the preceding rules and regulations for proceeding in causes where the owner or owners of a ship or vessel shall desire to claim the benefit of limitation of liability provided for in the act of Congress in that behalf, shall apply to the Circuit Courts of Appeals of the United States where such cases are or shall be pending in said courts on appeal from the District Courts.

# APPENDIX NO. IV.

## CHRONOLOGICAL LIST OF CASES IN THE UNITED STATES SUPREME COURT DEALING WITH THE LIMITATION OF LIABILITY OF SHIP-OWNERS.

# APPENDIX NO. IV.

## CHRONOLOGICAL LIST OF CASES IN THE UNITED STATES SUPREME COURT DEALING WITH THE LIMITATION OF LIABILITY OF SHIP-OWNERS.

## APPENDIX NO. IV.

### Chronological List of Cases in the United States Supreme Court Dealing with the Limitation of Liability of Shipowners.

*Propeller Niagara* v. *Cordes*, 21 How. 7 (1858).

*Moore* v. *American Transportation Company*, 24 How. 1 (1860).

*Norwich Company* v. *Wright*, 13 Wall. 104 (1874).

*The Wanata*, 95 U. S. 600 (1877).

*Lord* v. *Steamship Company*, 102 U. S. 541 (1880).

*The Benefactor*, 103 U. S. 239 (1880).

*The Scotland*, 105 U. S. 24 (1881).

*Ex Parte Slayton*, 105 U. S. 451 (1881).

*The Mamie*, 105 U. S. 773 (1881).

*The North Star*, 106 U. S. 17 (1882).

*Providence & N. Y. S. S. Co.* v. *Hill Manufacturing Co.*, 109 U. S. 578 (1883).

*The Mamie*, 110 U. S. 742 (1884).

*The City of Norwich*, 118 U. S. 468 (1885).

*The Scotland*, 118 U. S. 507 (1886).

*The Great Western*, 118 U. S. 520 (1886).

*Ex Parte Phenix Insurance Co.*, 118 U. S. 610 (1886).

*The Manitoba*, 122 U. S. 97 (1887).

*Butler* v. *Boston Steamship Co.*, 130 U. S. 527 (1889).

*In Re Garnett*, 141 U. S. 1 (1890).

*Craig* v. *Continental Ins. Co.*, 141 U. S. 638 (1891).

*In Re Engles*, 146 U. S. 357 (1892).

*In Re Morrison*, 147 U. S. 14 (1893).

*The Main* v. *Williams*, 152 U. S. 122 (1894).

*The Chattahoochee*, 173 U. S. 540 (1899).

*The Albert Dumois*, 177 U. S. 240 (1899).

*Oregon Navigation Co.* v. *Balfour*, 179 U. S. 55 (1901).

*The Robert W. Parsons*, 191 U. S. 17 (1903).

*The Hamilton*, 207 U. S. 398 (1907).

*La Bourgogne*, 210 U. S. 95 (1908).

*Richardson* v. *Harmon*, 222 U. S. 96 (1911).

*The San Pedro*, 223 U. S. 365 (1911).

*White* v. *Island Transportation Co.*, 233 U. S. 346 (1914).

*The Titanic*, 233 U. S. 718 (1914).

*Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 (1917).

*Clyde Steamship Company* v. *Walker*, 244 U. S. 255 (1917).

*Pendleton* v. *Benner Line*, 246 U. S. 353 (1918).

*Luckenbach* v. *McCahan Co.*, 248 U. S. 139 (1918).

*Capitol Transportation Company* v. *Cambria Steel Company*, 249 U. S. 334 (1919).

*Liverpool, etc. Company* v. *Brooklyn Terminal*, 251 U. S. 48 (1919).

*Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255 (1922).

# APPENDIX NO. V.

## OUTLINE OF STEPS IN A LIMITATION OF LIABILITY CASE.

## APPENDIX NO. V.

### Outline of Steps in a Limitation of Liability Case.

In the first case that came up to this court after the passage of the Limitation Act, *Norwich Co.* v. *Wright*, 13 Wall. 104 (1871), this court had occasion to discuss the proceeding that had been followed in that particular case and laid down at page 125, at great length, the procedure which should be followed in a proceeding for limitation of liability.

In the opinion it was stated that the court had drawn rules for dealing with these proceedings and those rules were published in 13 Wallace at page XII.

In order that the court may be reminded of the steps which are always had in limitation of liability proceedings, we have ventured to outline the procedure as follows:

1. *The first step is, of course, the filing of a petition.*

The petition sets forth the circumstances of the accident in respect of which limitation is desired, the jurisdictional facts, such as the presence of the vessel or part of her in the district, or the commencement of actions in the district in which the petition is filed.

The prayer of the petition is—

1. That an appraisal should be made of the value of the interest of the owner in the vessel and her pending freight or passage money.

2. That the court will take such steps as may be appropriate for the creation of the limitation fund by way

(*a*) of filing bond, (*b*) sale of vessel by a trustee or (*c*) whatever may be an appropriate remedy in the particular case.

3. That the court may provide for the issuance of a monition requiring all persons to come in and file their claim within a fixed period, usually three months.

4. An injunction shall issue restraining the commencement or prosecution of any proceeding against the petitioner except in the limitation case.

5. Then there is a prayer for judgment *exonerating* the petitioner entirely from any liability in respect of the matters that have happened, or in the alternative, providing that if the petitioner shall be adjudged liable his liability shall be limited to the amount of the fund created or the stipulation filed and the fund shall be distributed *pro rata* among the several claimants who may prove their claims.

II. *The next step in the limitation proceeding is the establishment of the limitation fund.*

This may be done

A. By turning over the vessel to a trustee to be sold and the proceeds paid in the registry of the court.

B. By having an appraisal by competent persons of the vessel and her pending freight and having the amount thereof paid into court, or

C. By having a bond given representing the amount of the appraisal.

Oftentimes, what is known as an *ad interim* stipulation is filed by order of the court in which there is an *ex parte* appraisal of the vessel and the freight, and the court orders a stipulation filed in the amount fixed by such appraisement, with leave to have a reappraisal on motion by any of the interested parties.

III. *When the fund is thus created* and the shipowner has complied with the procedure laid down by the statute and the rules of this court *there is issued an order for monition* providing for the service of a monition or summons on all parties known and the publication thereof for a named period in an appropriate newspaper in order that the world may be advised of the proceeding.

*At the same time an injunction issues* against the institution of suit in respect of the matters involved elsewhere than in the limitation proceeding. Though customary an injunction is apparently unnecessary under the decision in *The San Pedro,* 223 U. S. 365.

IV. In connection with the monition there is usually appointed *a commissioner* whose duty it is *to receive the claims filed in the proceeding* and assemble them and report the nature and amount thereof to the court.

This is a matter of convenience which enables the court to find out at an early date what claims are brought against the petitioner.

V. *The return day* of the monition is the day on which the *answers* are supposed to be *filed* and the time when further claims become outlawed unless allowed to be filed by special order.

VI. On or before the return day of the monition the petitioner files *exceptions* or *objections to the claims* in which any cross-liabilities claimed on behalf of the petitioner against any particular claimant are set forth.

VII. The next papers to be filed in the case are the *answers by the claimants* who may have come into the proceeding.

These answers may challenge either (a) the question of liability or (b) the question of the owner's privity, or (c) both of these questions.

In many cases the liability only is questioned and the question of privity goes by default in the shipowner's favor.

VIII. The next step, of course, is a hearing on the evidence, at which the court determines whether the shipowner has made out a case freeing him from all liability as, for example, the case of *The Lusitania*, 251 Fed. 715; holding him liable but allowing him to have his limitation, as was the case of *The Old Dominion Steamship Company*, 207 U. S. 398; or holding him liable and disallowing his claim for limitation, as, for example, the case of *The Benjamin Noble*, 249 U. S. 334.

IX. *The appropriate decree* will then be entered either dismissing all claims and exonerating the shipowner or sending the case to the commissioner with instructions to fix the damages, and allocate the recoveries against the fund if limitation is granted, or, if limitation has not been granted by the court, to find the damages and assess them against the shipowner in the amounts found in full. A permanent injunction against all suits is part of the final decree.

# APPENDIX NO. VI.

## SECTION 33 OF THE MERCHANT MARINE ACT, 1920, IN THE CONGRESSIONAL RECORD.

## APPENDIX VI.

### Section 33 of the Merchant Marine Act, 1920, in the Congressional Record.

The Congressional Record shows that the Merchant Marine Act originated in the House of Representatives, in a bill consisting of thirteen sections dealing primarily with the Shipping Board and the sale of vessels.

The Senate received the House Bill of thirteen sections. The Senate Committee considered the bill and suggested numerous amendments. The Senate Committee hearings are not reported in the Congressional Record.

The Senate amendment to H. R. 10378 was Amendment No. 139 and offered as Section 36, the identical section which later became law as Section 33, with the exception that the last sentence of Section 33, dealing with jurisdiction, was not included.

*Congressional Record, Vol. 59, Part 7, p. 7044.*

The amendment to Sec. 20 of the Seamen's Act, i. e. the present Sec. 33 of the Merchant Marine Act 1920, was discussed in the Senate Committee and was reported in the "Hearings before the Committee on Commerce of the United States Senate 66 Congress 2nd session relative to the establishment of an American Merchant Marine" at pp. 1709 and 1712-13.

As follows, at page 1709:

> "Mr. Furuseth.* There is another section to this, the amendment to section. Section 10 of the seamen's act provides that in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow servants with those under their authority. The Supreme Court in the Chelentis case held that that was meaningless because it had reference to the common law, and the common law had no jurisdiction on board a ship, and so, we will have to, after 15 years of following the common law, in this decision we have got to change all that, and now here is the Supreme Court decision in the case of *Chelentis* v. *The Luckenbach Steamship Co. (Inc.)*."

Then the opinion of this court in the case of *Chelentis* v. *The Luckenbach Steamship Co.*, 247 U. S. 372, was quoted in full.

Then ensued the following discussion at pages 1712-13:

> "The Chairman. What is the amendment you suggest to section 20?
>
> "Mr. Furuseth. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to rail-

* A Norwegian and President of International Seamen's Union of North America. *Senate Hearings on Merchant Marine Act*, page 1625.

way employees shall apply. And in the case of the death of any seaman as the result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. That is the amendment.

"Senator Fletcher. In other words, under the common law if a sailor should step through an open hatch that had been left carelessly open, he would have no remedy?

"Mr. Furuseth. He would have no remedy.

"Senator Fletcher. And now you want to change that so he would have a remedy, provided his own negligence did not bring about the injury.

"Mr. Furuseth. That is it exactly.

"Senator Chamberlain. The fellow servant doctrine does not apply to that?

"Senator Nelson. Does that law abolish the fellow servant's rule?

"Senator Chamberlain. It does not exist in admiralty, I think.

"Senator Nelson. And does it abolish the assumption of risk?

"Senator Fletcher. I think it does.

"Senator Nelson. The assumption of risk in the fellow servant's rule goes to the vital rules.

"Senator Fletcher. Yes.

"Mr. Furuseth. With those two, Section 4 and Section 11, it puts it straight if we can get Section 13 and 14 enforced—and there is some hope of it now, I suppose; we have got a new Secretary of Commerce. We have now got some hope of it.

"Senator Nelson. I would suggest to your amendment to Section 20 in line 17 that you transpose the words 'at law' and have them inserted after action, so it would read 'maintain an action at law for damages.'

"Mr. Furuseth. Well, that is all right.

"Senator Nelson. Instead of an action for damages at law.

"Mr. Furuseth. Of course, that is a matter to take care of, that section 20 there to take care of seamen after they are on board of a vessel."

The amended bill of the Senate was sent to the House which refused to accept the Senate amendments. A conference Committee of members of the House and Members of the Senate was appointed and considered the bill.

The bill was reported by the Conference Committee several times and was sent back to conference several times before it was finally passed.

The conference report on the bill was read into the Record. *Volume 59, Part 8, p. 8398.*

At page 8404, the conference report stated that Amendment No. 139 (covering §33 of the Act as finally passed) of the Senate was agreed upon, because the House receded from its disagreement on this amendment when it was allowed to add the sentence as to venue.

There was not any discussion of this amendment Number 139, and the statement of the Conference Committee annexed to the conference report and read into the Record at page 8408, was as follows:

"On Amendment No. 139: This amendment amends Section 20 of the Seamens' Act, so as to

extend the Federal Employers Liability Act to cases of personal injury to or death of seamen. The House recedes with an amendment that jurisdiction of all actions brought under the provisions of Section 20, shall be under the court of the district in which the defendant employer resides, or in which his principal office is located."

On the second submission of the conference report, in Volume 59, Part 8, page 8448, there is no change in this Amendment No. 139, and the same statement regarding it is annexed to the report.

The discussions of the Merchant Marine Act of 1920, in both the House and the Senate, were very extensive and voluminous; but most of the discussion centered around the sale of the vessels and the subsidy and income tax provisions of the bill.

In a rather extensive search, we are unable to discover any discussion of the present Section 33, which section seems to have been added and passed without much consideration.

# APPENDIX NO. VII.

## RECENT UNREPORTED OPINION BY THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT DEALING WITH THE QUESTIONS CERTIFIED IN THE INSTANT CASE.

## APPENDIX NO. VII.

RECENT UNREPORTED OPINION BY THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT DEALING WITH THE QUESTIONS CERTIFIED IN THE INSTANT CASE.

IN THE

## UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE CHARLES NELSON COMPANY, a Corporation,
Appellant,
*vs.*
THOMAS S. CURTIS,
Appellee.
No. 4180.

UPON APPEAL FROM THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, THIRD DIVISION.

IN ADMIRALTY: Petition of The Charles Nelson Company for limitation of liability.

FARNHAM P. GRIFFITHS,
JAY T. COOPER,
McCUTCHEN, OLNEY, MANNON & GREENE,
*Proctors for Appellant (Petitioner).*

HALSEY L. RIXFORD, *Proctor for Appellee.*

Before GILBERT, MORROW, and RUDKIN, Circuit Judges.

MORROW, Circuit Judge:

On August 30, 1922, Thomas S. Curtis, hereinafter referred to as the plaintiff, commenced an action on the law side of the District Court to recover damages from The Charles Nelson Company, the owner of the barkentine *Mary Winkleman*, for personal injuries alleged to have been sustained by him while serving as a seaman on board said vessel.

It was alleged that the injuries were caused solely by the negligence of the defendant, its officers and agents.

The suit was brought under Section 33 of the Merchant Marine Act of June 5, 1920 (41 Stat. 1007). This statute provides: "That any seaman who suffers personal injury in the course of his employment may, at his election, maintain an action for damages at law with the right of trial by jury and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply."

Thereafter, and on February 16, 1923, The Charles Nelson Company, claiming to be the owner of the barkentine *Mary Winkleman*, filed a petition in the District Court for limitation of liability under the Act entitled "An Act to Limit the Liability of Shipowners and for Other Purposes", approved March 3, 1851 (9 Stat. 635, as amended and incorporated in Sections 4283 to 4289 of the Revised Statutes). (Comp. Stats. 8021 to 8023.)

The Charles Nelson Company will hereinafter be referred to as the petitioner.

The Act of 1851 provided in Section 3 of the Act:

> "That the liability of the owner or owners of any ship or vessel * * * for any * * * damage * * * done, occasioned, or incurred without the privity or knowledge of such owner or owners shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending."

The Act was amended by the Act of June 26, 1884 (23 Stat. 53, 57). In Section 18 of this amendatory Act it was provided:

> "That the individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his undivided share of the vessel bears to the whole; and the aggregate liability of all the owners of a vessel, on account of the same, shall not exceed the value of such vessel and freight pending. * * *"

The Act was further amended by the Act of June 19, 1886 (24 Stat. 79, 80), so as to extend the provisions of Section 18 of the Act of 1884 to all seagoing vessels.

The petitioner, referring to the accident resulting in the injuries for which plaintiff brings his suit at law, alleges:

> "That on the 5th day of September, 1921, the said barkentine *Mary Winkleman* was lying becalmed in the waters adjacent to the Island of Hawaii; that on said date after about thirty fathoms of chain had been paid out it was discovered that there was a kink in said chain and in order

to free said chain of said kink Paul Raddatz, first mate of said vessel, directed Thomas S. Curtis, who was serving on board said vessel in the capacity of an able-bodied seaman, to go with him to the chain locker in which said chain lay coiled for the purpose of straightening out or freeing said chain of the kink. The said mate Raddatz and the said Curtis thereupon descended to the chain locker located on a platform in the forepart of said vessel and proceeded to remove the kink from said chain. To furnish light for this work, a lighted lantern was taken by the mate. That after the work of freeing said anchor chain had been accomplished and the chain allowed to run free through the hawse pipe, the said Thomas S. Curtis carelessly stepped backward until he stepped off the after end of the said platform upon which the chain locker was located and fell to the bottom of the vessel's hold, which was empty at that time."

Petitioner alleges that any injury suffered by the plaintiff by reason of his falling from the platform into the hold of the vessel was due solely to his fault, and that the petitioner was not in any wise responsible for such injuries. Petitioner alleges further that the amount of plaintiff's claim greatly exceeds the value of the said barkentine, and that the vessel did not carry any cargo on the voyage on which it was proceeding, and that no freight was pending at the time the voyage terminated.

Petitioner alleges further that the injuries to plaintiff, and all damages and injuries, whether of person or property, done, occasioned, and incurred upon the voyage of

the barkentine were done, occasioned, and incurred without the consent or privity or knowledge or design or neglect of the petitioner.

Petitioner prayed for an order of appraisement to be had of the value of the said barkentine at the close of the voyage upon which plaintiff met with his alleged injuries including the amount of freight pending, if any, and that a stipulation or undertaking might be given by the petitioner with sureties conditioned for the payment into court of such appraised values, and that a monition issue against the plaintiff and all other persons claiming damages by reason of injuries to persons or property occurring or arising upon said voyage, citing them and each of them to appear before the court and make due proof of their respective claims at the time to be therein named. The regular procedure provided by Admiralty Rule #51 (adopted December 6, 1920, to take effect March 7, 1921) was thereupon followed. The value of the *Mary Winkleman* was fixed by appraisement at a hearing before a United States Commissioner at $1500. with no freight pending. This appraisement was approved by the court. Subsequently a court order was entered, requiring all claimants to make proof of their claim against petitioner in the proceedings for limitation of liability, and staying all other proceedings against petitioner, and specifically the suit commenced by plaintiff against the petitioner. Thereafter motion was made by plaintiff's proctor, who appeared specially for that purpose, to have the order of the court staying all proceedings in plaintiff's action at law vacated. Upon a hearing this motion was

granted, the court holding that petitioner had no right to have the suit of plaintiff stayed, and that the Limited Liability Act was repealed insofar as it applied to the right of action given a seaman by Section 33 of the Merchant Marine Act of June 5, 1920.

There are no words of positive or express repeal in the section or in the statute of which it is a part.

"It is elementary that repeals by implication are not favored and that a repeal will not be implied unless there be an irreconcilable conflict between the two statutes." *Petri* v. *Creelman Lumber Co.*, 199 U. S. 487, 497; *Ex parte United States*, 226 U. S. 420, 424.

The Act in which the section is found is entitled "An Act to provide for the promotion and maintenance of the American merchant marine, to repeal certain emergency legislation, and provide for the disposition, regulation, and use of property acquired thereunder, and for other purposes."

The Act provides specifically for the repeal of certain acts relating to emergency shipping legislation passed in 1916, 1917, 1918, and 1919. It also provides regulations for other subjects within the general scope of maritime law and practice.

The evident care exercised by Congress in preparing this Act in all its numerous details of enactments and repeals carries with it the presumption that it provided for the repeal of all statutes that might expressly or impliedly be deemed in conflict with the legislation contained in the Act, and that a statute not so expressly repealed was not deemed to be in conflict with Section 33 of the Act.

In *Panama R. R. Co.* v. *Johnson,* decided April 7, 1924 (advance sheets), the Supreme Court, referring to the course of legislation upon this subject, said:

> "The framers of the Constitution were familiar with that system" the general maritime law, "and proceeded with it in mind. Their purpose was not to strike down or abrogate the system, but to place the entire subject—its substantive as well as its procedural features—under national control because of its intimate relation to navigation and to interstate and foreign commerce."

The court, further on, again referring to the course of legislation "as exemplified in Section 9 of the Judiciary Act of 1789, Sections 563 (par. 8) and 711 (par. 3) of the Revised Statutes, and Sections 24 (par. 3) and 256 (par. 3) of the Judicial Code," said it "always has been to recognize the admiralty jurisdiction as open to the adjudication of all maritime cases as a matter of course, and to permit a resort to common law remedies through appropriate proceedings *in personam* as a matter of admissible grace."

From this course of legislation the court draws the conclusion.

> "It therefore is reasonable to believe that had Congress intended by this statute to withdraw rights of action founded on the new rules from the admiralty jurisdiction and to make them cognizable only on the common-law side of the courts, it would have expressed that intention in terms befitting such a pronounced departure,—that is to say, in terms unmistakably manifesting a purpose

to make the resort to common-law remedies compulsory, and not merely permissible. But this was not done. On the contrary, the terms of the statute in this regard are not imperative but permissible. It says 'may maintain' an action at law 'with the right of trial by jury', the import of which is that the injured seaman is permitted, but not required, to proceed on the common law side of the court with a trial by jury as an incident. * * * So construed, the statute does not encroach on the admiralty jurisdiction intended by the Constitution, but permits that jurisdiction to be invoked and exercised as it has been from the beginning."

Furthermore, the new admiralty rules now in force and prescribed by the Supreme Court for regulating the practice in the courts of admiralty of the United States were revised, adopted, and promulgated December 6, 1920, to take effect March 7, 1921. This was more than six months after the passage of the Act of June 5, 1920. The presumption is that the Supreme Court had this act before it and was familiar with its provisions when it adopted Admiralty Rule #51.

That Rule authorizes the procedure followed by the court in this case, including the making of "an order for a monition against all persons claiming damages of said petitioner by reason of injuries to persons or property occurring or arising upon the voyage of said barkentine *Mary Winkleman*," citing them "* * * to appear before the court and make due proof of their respective claims * * *." The court made the further "order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect to any such

claim or claims, including plaintiff's claim. Subsequently this last restraining order of the court was vacated by a second order of the court. The question is, Was the District Court right in vacating its previous order made in pursuance of the Limitation of Liability Act and Revised Admiralty Rule #51, on the ground that Section 33 of the Act of June 5, 1920, had repealed the Limitation of Liability Act and Admiralty Rule #51 as revised?

It was the opinion of the Judge of the District Court that the right of a seaman who has suffered a personal injury in the course of his employment to *elect* to *maintain* an action for damages at law under Section 33 of the Act of June 5, 1920, is absolutely inconsistent with the right of the owner of the vessel to proceed under the Limitation of Liability Act to limit his liability against a judgment under that section to the value of the vessel and the then pending freight; that in sustaining the Limitation of Liability Act in such a case the injured seaman would not have the right of an "election" to "maintain" his action for damages at law with the right of trial by jury. The court was of the further opinion that in using the words "election" and "maintain" Congress must have intended to give the injured seaman a right to recover his damages against the owner in any event, and not to leave him to take his chances with other creditors in the proceeds or value of the ship. The court accordingly held that Section 33 of the Act of June 5, 1920, repealed by implication the provisions of the Limitation of Liability Act so far as the same is inconsistent with the provisions of that section.

A satisfactory construction of the statute standing alone is possibly not without some difficulty, as appears from the opinion of Judge Learned Hand in *The El Mundo*, 294 Fed. 577; the opinion of Judge Garvin in *The Edward*, 294 Fed. 686, and the certificate of questions from the Circuit Judges of the Second Circuit (Judges Rogers, Hough, and Mayer) to the Supreme Court on May 28, 1923, in the case of *The Edward*, 291 Fed. 1017; and the case of *The Scow 84-H*, 296 Fed. 427, in the same court, decided by Rogers, Manton, and Mayer, on December 17, 1923, where, notwithstanding the previous questions certified to the Supreme Court, the Circuit Court of Appeals sustained a petition for the limitation of the liability of the owner of the Scow against an action at law in the state court for damages for personal injury. Finding no negligence on the part of the owner of the Scow, the court, in that case, directed a decree exempting the owner from all liability.

We think, however, a careful consideration of the history of the law upon the subject and its construction by the courts, particularly the recent decision of the Supreme Court in *Panama R. R. Co.* v. *Johnson* (Advance Sheets April 7, 1924; 264 U. S. 375), will give us a satisfactory understanding of the meaning of the section and the purpose of Congress in its enactment.

Section 2 of Article III of the Constitution extends the judicial power of the United States to "all cases of admiralty and maritime jurisdiction".

Proceedings to limit the liability of shipowners are

admiralty cases. *Oregon R'd and Nav'n Co.* v. *Balfour*, 179 U. S. 55.

"The subject (limitation of liability) is one pre-eminently of admiralty jurisdiction. The rule of limited liability prescribed by the Act of 1851 is nothing more than the old maritime rule administered in courts of admiralty in all countries except England, from time immemorial; and if this were not so, the subject-matter itself is one that belongs to the department of maritime law." *Providence & N. Y. SS. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 593.

Section 9 of the Act of September 24, 1789, (1 Stat. 73, 77) provided in Section 9 that the District Courts should "have exclusive original cognizance of all causes of admiralty and maritime jurisdiction * * * saving to suitors in all cases the right of a common law remedy where the common law is competent to give it * * * and the trial of issues in fact in the District Court in all cases except civil causes of admiralty and maritime jurisdiction shall be by jury."

"The meaning of the clause in the ninth section of the Judiciary Act of 1789, saving to suitors in all cases a common law remedy where the common law is competent to give it, is that in cases of concurrent jurisdiction in admiralty and at common law the jurisdiction in the latter is not taken away." Syllabus in *Waring* v. *Clarke*, 46 U. S. (5 How.) 440, 441, 460.

In *Industrial Accident Comm.* v. *Nordenholt Co.*, 259 U. S. 263, 273, the Supreme Court said:

"When an employee, working on board a vessel in navigable waters, sustains personal injuries there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of employer must be determined under the maritime law; in the latter, no general maritime rule prescribes the liability, and the local law has always been applied. The liability of the employer for damages on account of injuries received on shipboard by an employee under a maritime contract is matter within the admiralty jurisdiction; but not so when the accident occurs on land."

A seaman who has suffered a personal injury in the course of his employment has always had, therefore, an election since this original judicial act of 1789 to maintain an action at law to recover damages for such injury with the right of trial by jury, the compensatory damages, in admiralty, having relation to the wages of the injured seaman to the end of the voyage and the expense of his maintenance and cure for a reasonable time thereafter. To this right of indemnity has been added by Section 33 of the Act of June 5, 1920, the further right to invoke in such action "all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees."

The reference is to the Employers' Liability Act of April 22, 1908, 35 Stat. 65, and its amendments.

In *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 215, 216, the Supreme Court said:

> "Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country."

In *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, 382, the Supreme Court said:

> "Under the doctrine approved in *Southern Pacific Co.* v. *Jensen*, no State has power to abolish the well recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.'"

The court said further:

> "The language of the Section discloses no intention to impose upon shipowners the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes for employers in respect of their employees on shore. In other words, a seaman could not recover at common law for injuries by negligence on the high seas."

To avoid the objection that no state has the power to change or add to the maritime law, Section 33 of the Act of June 5, 1920, was passed, placing the authority in Congress where the power to add to and amend that law is lodged, that it may be uniform in its operation and prevail throughout the country. *Panama R. R. Co.* v. *Johnson*, supra. That was an action at law under Section 33 to recover damages for personal injuries received by a seaman upon a vessel at sea. The court explains the purpose of the statute as follows:

> "Rightly understood the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seaman to do so. On the contrary, it brings into that law new rules drawn from another system and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules. The election is between alternatives accorded by the maritime law as modified, and not between that law and some non-maritime system."

There is no suggestion in that case that the maritime law is in any respect repealed or even modified. We, therefore, return to that law for direction as to procedure.

The case of *The Benefactor*, 103 U. S. 239, was a case of collision off the coast of New Jersey. A limitation of liability was involved. Mr. Justice Bradley, speaking for the Supreme Court, points out with his usual clearness the paramount character of the statute providing

for the limitation of liability of shipowners to the extent and under the circumstances therein stated.

Upon a hearing the District Court adjudged the steamer to be at fault and assessed the damages to libellants and intervenors at $61,810.49. The steamer had previously been appraised and released upon stipulation for the value of $40,000. The court thereupon directed the claimants and their sureties to pay into the registry of the court the amount of the stipulated value of the vessel and for costs,—namely $500. for costs and $40,000. for the appraised value of the steamer, and in default of an appeal the clerk was directed to distribute the proceeds among the libellants in proportion to their recoveries. Nearly two years later the owners of the steamer petitioned the court for limitation of their liability under Section 4283 of the Revised Statutes, alleging that "the loss and damages was without their privity or knowledge." They also petitioned for a final decree that the amount of the stipulated value be distributed pro rata among the claimants, and that upon payment thereof the steamship and the petitioners be forever discharged from further liability, and that an order be made restraining the libellants in the other suits from further prosecuting the same. The District Judge denied the motion for a restraining order, and dismissed the petition for limitation of liability. Upon appeal to the Circuit Court this decree was affirmed. The ground of dismissal relied on by the District Court and adopted by the Circuit Court was that the petition came too late,

inasmuch as it was not filed until after a trial of the cause upon its merits and a final decree thereon.

On appeal to the Supreme Court Mr. Justice Bradley, in his opinion, refers to the ruling of the District Judge, and says:

> "He (the District Judge) supposes that this right to contest the case on the merits at the same time and in the same proceedings that a limited liability is claimed, implies that such proceedings must be instituted before the case has been tried on its merits, because a second trial of the same matter after it has once been adjudicated, will not be deemed to have been contemplated by the rule (56). In supposing that a second trial of the merits between the same parties was not contemplated by the rule, the Judge was correct. But it was certainly not the intention of the Admiralty Rules to preclude a party from claiming the benefit of a limited liability after the trial of the cause of collision."

After explaining the origin of the Admiralty Rule on the subject and the procedure therein provided, the Court said:

> "The amount recovered, whether before the limitation proceedings are commenced or afterwards and whether in the court of first instance or an appellate court, will stand as the recoverer's basis for *pro rata* division when the condemned fund is distributed. In all other respects the proceedings for obtaining a limitation of liability may proceed in ordinary course. * * *"

We come now to the conclusion of the court applicable to the question we have under consideration in this case. The court says:

> "But so far as the petition sought a limitation of the owner's liability to the value of the ship and freight, it was free from objection and ought to have been sustained; and the libellants and intervenors ought to have been restrained by order of the court from collecting or attempting to collect or enforce their respective decrees, whether obtained in that court or in the court of appeal in any other manner than by the *pro rata* distribution of the fund standing by stipulation in place of the ship and freight."

Upon a motion to modify the judgment and mandate, the court, by Mr. Justice Bradley, said further:

> "A question has been made whether, under our decisions in these cases, proceedings ought to be stayed on the decree of the respondents against the steamship *Benefactor*, her claimants and stipulators, until the determination of the proceedings on the petition for limited liability. We have no hesitation in saying that they ought to be so stayed. Our opinion was very clearly expressed, in deciding the limited liability case, that the petitioners were not too late to obtain relief, and that proceedings to collect any decrees rendered against them should be stayed. We held that such decrees would have the effect of res judicata on the question of the liability of the steamship, and as to the amount of damage sustained by the libellants; and that the amount of the decrees would stand as the basis

for determining the pro rata share of the libellants in the common fund to be distributed on the termination of the limited liability proceedings."

In the case of *The San Pedro*, 223 U. S. 365, 371, the Supreme Court held that "The very nature of the proceeding (limitation of liability) is such that it must be exclusive of any separate suit against an owner on account of the ship. The monition which issues when the vessel has been surrendered, and a stipulation entered into to pay the value into court, requires every person to assert his claim in that case."

The right of the shipowner to proceed under the maritime law to limit his liability to the value of the vessel is, therefore, not subordinate to the right of the injured seaman to maintain an action at law to recover damages for his injuries. These rights are independent and in some respects concurrent. But with respect to the final decree, limiting the liability of the shipowner, that law is paramount.

It follows that unless we hold with the court below that Section 33 of the Merchant Marine Act repealed so much of the Limitation of Liability Act as would require the injured seaman to come into the court of admiralty and prove his claim for damages, we must sustain the right of the shipowner to proceed in the limitation of liability proceedings. This is clearly the law as declared in *Panama Railroad Co.* v. *Johnson*, supra.

Appellee has made a motion to dismiss this appeal, or in the alternative transfer the case to the United States Supreme Court. The motion is made on the ground that the order appealed from is not a final decree.

The order vacated a previous order staying plaintiff's action at law against the petitioner. The previous order was made and entered in accordance with the provision of Section 4283 of the Revised Statute, limiting the liability of shipowners, and Rule #51 prescribed by the Supreme Court regulating the practice of courts of admiralty in such proceedings. The vacating order was made upon the ground that Section 33 of the Act of June 5, 1920, repealed by implication the Limitation of Liability Act. This was in effect a final decree in that court upon that question, and practically terminated the proceedings brought by the petitioner to limit its liability under the Act.

As said by the Circuit Court of Appeals of the Fourth Circuit in the case of *The Attualita*, 238 Fed. 909, 910, if this order "remains unreversed, nothing else can be done in the court below which would be worth doing." This would be the situation of the petitioner in this case if the order stands.

The court said further:

> "The question whether a decree is final and appealable is not determined by the name which the court below gives it, but is to be decided by the appellate court on consideration of the essence of what is done by the decree."

To the same effect is the case of *The Pesaro*, 255 U. S. 216, 217, where it was objected that the decree did not dismiss the libel, and the court said:

> "That it does not formally do so is true, but this is not decisive. The suit is *in rem*—is against

the ship. The decree holds for naught the process under which the ship was arrested, declares she is not subject to any such process and directs her release—in other words, dismisses her without day. Thus the decree ends the suit as effectually as it formally dismissed the libel. Obviously, therefore, it is final."

We are of the opinion that the case is one for our decision.

We are of the further opinion that the order of the District Court dated January 3, 1924, vacating the previous order of the court dated November 3, 1923, staying the plaintiff's action at law against the petitioner, was in effect a final decree, and, being erroneous, must be reversed; the order of November 9, 1923, must be reinstated and further proceedings had in accordance with the Limitation of Liability Act.

---

ENDORSED: Filed Oct. 27, 1924.

F. D. MONCKTON, Clerk
By Paul P. O'Brien, Deputy Clerk.